No. 18-1778

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CHARTER COMMUNICATIONS, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Agency Nos. 07-CA-140170, 07-CA-145726, 07-CA-147521

CHARTER COMMUNICATIONS, LLC'S OPENING BRIEF

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Dated: November 8, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Charter Communications, LLC makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Answer: Charter Communications, LLC is an indirect subsidiary of Charter Communications, Inc. All of Charter Communications, LLC's membership interest is owned by Charter Communications Operating, LLC, which is also an indirect subsidiary of Charter Communications, Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Answer: No.

Dated: November 8, 2018

s/ Matthew T. Nelson

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STATEMENT REQUESTING ORAL ARGUMENT

Petitioner/Respondent Charter Communications, LLC ("Charter") petitions this Court for reversal of a National Labor Relations Board ("Board") Decision and Order that ignored applicable law and is not based on substantial evidence. This dispute arose from Charter's 2014 termination of three employees (Jonathan French, James DeBeau, and Raymond Schoof), a manager (TJ Teenier) and a supervisor (Shawn Felker). Charter had received a report that DeBeau, Schoof, Teenier and Felker were doing personal work on company time. After extensive investigation, Charter determined DeBeau and Schoof had misused company time. Charter also concluded that all five had impeded the investigation.

These five employees provided shifting and contradictory stories during Charter's investigation, during the Board investigation, and throughout the hearing. Rather than untangle or ignore the witnesses' admissions and contradictory statements, the Board cherry-picked fragments of testimony to conclude that Charter could not terminate the three of the employees for their misconduct during the investigation. The Board also held that Charter violated the National Labor Relations Act in several other ways based on unrelated and untimely allegations. The Board applied incorrect legal standards, and reached conclusions that were not supported by substantial evidence. Due to the case's factual and legal complexity, Charter requests oral argument.

JURISDICTIONAL STATEMENT

This case is before the Court on Charter's petition for review of the Board's March 27, 2018 Decision and Order, reported at 366 N.L.R.B. No. 46.

The Board had subject-matter jurisdiction over the underlying proceedings pursuant to Section 10(a) of the National Labor Relations Act ("Act") (29 U.S.C. § 160(a)), which authorizes the Board to decide unfair labor practice charges. Charter's petition for review, filed July 11, 2018, is timely.

The individuals on whose behalf the Board brought this action were residents of Michigan at the time of the underlying proceedings. Charter transacts business in Michigan.

This Court has appellate jurisdiction over the petition under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that parties may file petitions for review of Board decisions in the circuit where the unfair labor practices allegedly occurred. The alleged practices underlying this dispute took place in Michigan.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the Board erred by holding that Charter violated Section 8(a)(3) and (1) of the Act by discharging Jonathan French, Raymond Schoof, and James DeBeau. (3/27/18 NLRB Decision & Order 13, PgID 2395.) [1]

2. Whether the Board erred by holding that the allegations in paragraphs 7, 8(a), 8(b), 8(c), 8(d), 9(a), 10, 11(a), 11(c), and 13 of the General Counsel's Complaint were timely filed, notwithstanding the timeliness limit in Section 10(b) of the Act.

3. Whether the Board erred by holding that Charter violated Section 8(a)(1) of the Act by:

   a. Reassigning Jonathan French, Raymond Schoof, and James DeBeau to rural areas. (*Id*. 25, PgID 2407)

   b. Surveilling employees' union activity. (Compl. 3-5, PgID 1885-1887.)

   c. Creating the impression of surveillance of an employee's union activities. (*Id*.)

   d. Coercively interrogating an employee about his union activity. (*Id*.)

   e. Threatening an employee with closer supervision because of his union activities. (*Id*.)

   f. Soliciting grievances from an employee and impliedly promising to remedy them in order to discourage the employee from supporting a union. (*Id*.)

   g. Closely monitoring an employee because of his union activities. (*Id*.)

[1] All record citations are to the Administrative Record, R.12 on the Sixth Circuit's docket.

INTRODUCTION

On October 14, 2014, Petitioner/Respondent Charter Communications LLC ("Charter") terminated five individuals—three employees, one supervisor, and one manager—for lying and impeding its investigation into their conduct. Even though the Board found that the fired manager had tried to stifle union activity, and two of the employees engaged in no union activity, it concluded that these terminations were all motivated by anti-union animus. The Board applied incorrect legal standards, and relied on cherry-picked testimony from admitted liars who contradicted themselves and each other. Its decision is not supported by substantial evidence.

In September, 2014, a manager reported that two employees (Raymond Schoof and James DeBeau) and a manager and a supervisor (TJ Teenier and Shawn Felker) were doing personal work on company time. This included laying sod at Schoof's house, working on Teenier's rental property, and working on a haunted house owned by one of Teenier's friends. Charter's human resources manager investigated by interviewing eight witnesses and reviewing documents. One of the witnesses interviewed was a fifth employee, Jonathan French. During the investigation, the four named individuals and French were combative and dishonest; they withheld information and contradicted each other as they told

shifting and nonsensical stories. They ultimately admitted this deceptive behavior at the hearing in this matter. Charter terminated all five.

Each of the five filed charges with the NLRB, claiming their terminations were somehow connected to a brief and aborted union organizing drive at one of Charter's facilities. Fifteen months later, at the request of the Board's Regional Office, French filed an amended charge with numerous untimely allegations unconnected to his original allegations.

After an Administrative Law Judge ("ALJ") found primarily for Charter, the Board reversed and held that Charter had violated the National Labor Relations Act (the "Act") in virtually every way alleged by the General Counsel. The Board made three key errors:

- In its ruling that Charter terminated the employees to discourage union activity in violation of Section 8(a)(3) of the Act, the Board applied an incorrect test. Such a violation occurs only when an employer specifically intends to discourage union activity. Rather than focus on Charter's ***reasonable belief*** that the employees had committed misconduct, the Board re-weighed all the evidence in Charter's investigation to determine whether the employees had ***actually committed*** the misconduct. Under the correct test as laid out in Board precedent, the Board's conclusion that the terminations violated the Act is not supported by substantial evidence.

- The Board also erred by considering only testimony that supported its conclusions, while ignoring directly contradictory testimony ***from the same witnesses*** and other General Counsel witnesses, often rejecting the ALJ's credibility determinations. This infected the Board's conclusions with respect to the terminations and the other alleged

violations. No reasonable reading of the record could find substantial evidence to support the Board's findings.

- The Board failed to follow its own precedent regarding the timeliness of many of the charges. The initial charges in this case focused only on the three terminations and one other act. Fifteen months later, the Board asked French to file an amended charge complaining about unrelated conduct by Teenier and other supervisors. While these allegations also fail on their own merits, they should not have been considered at all because of the Act's six-month statute of limitations.

The Board's incorrect legal analysis and unsupported conclusions are errors that warrant reversal.

STATEMENT OF THE CASE

Charter is a cable telecommunications company that delivers phone, internet, and television services throughout the country. (3/27/18 NLRB Decision & Order 13, PgID 2395.) French, DeBeau, and Schoof worked as Field Auditors at Charter's Bay City and Saginaw locations in Michigan, until their termination on October 14, 2014.

Charter depends on field auditors to be honest and trustworthy

Charter's Field Auditors are responsible for identifying and disconnecting persons who are receiving unauthorized services. (4/26/16 Hrg. Tr. 33, PgID 40; 8/16/16 Hrg. Tr. 1645-1646, 1648-1649, PgID1661-1662, 1664-1665.) In 2014, Charter was serving about 540,000 homes in Michigan, and Charter Field Auditors

checked the accuracy of its services at every single location. (4/26/16 Hrg. Tr. 33, 40, PgID 40, 47; 8/16/16 Hrg. Tr. 1649, PgID 1665.) Field Auditors work both urban and rural areas, with those assigned to rural areas receiving less supervision. (4/29/16 Hrg. Tr. 497, 507, PgID 507, 517.) Charter holds its Field Auditors to a high standard of honesty; an unethical Field Auditor could allow friends to continue to get service without paying for it. (4/27/16 Hrg. Tr. 112-113, PgID 120-121.)

The kingpin: TJ Teenier

A key figure in this case is Terry James Teenier, the ringleader of the group ferreted out by Charter's investigation, and now a vengeful antagonist towards Charter. In 2014, Teenier was the manager of plant security and technical quality assurance for the entire state of Michigan. (4/28/16 Hrg. Tr. 361-363, PgID 370-372.) Four supervisors reported to Teenier, including Rob Lothian (who covered the northeast corner of the state) and Shawn Felker (who covered the southeast corner). (*Id*. at 363, PgID 372.)

Teenier admitted he routinely made decisions he thought were best for him and his team, even when those decisions varied from, or were contrary to, company policy. (4/29/16 Hrg. Tr. 483-484, PgID 493-494.) For example, Teenier allowed his employees to alter their start times to provide them with additional paid time on the clock; allowed customers he personally knew to bypass Charter's call center process and provided them with direct assistance (*id.* at 480-

481, PgID 490-491); and permitted Field Auditors to work schedules outside the prescribed work schedules for that position. (8/16/16 Hrg. Tr. 1658, PgID 1674.)

Things took an unfortunate turn for Teenier's fiefdom in February 2013, when Charter hired Greg Culver as Director of Plant Security for Michigan and New England, making him Teenier's boss. (*Id.* at 1645-1646, PgID 1661-1662; 4/29/16 Hrg. Tr. 482-483, PgID 492-493.) While Teenier's prior manager had been hands-off, Culver managed Teenier more closely. (4/29/16 Hrg. Tr. 484, PgID 494.) For example, Culver told Teenier that Field Auditors could no longer work four 10-hours shifts and had to work 8:00 to 5:00 with an hour lunch. (8/16/16 Hrg. Tr. 1658-1559, PgID 1674-1675.) Teenier, however, was used to having things his own way and ignored Culver's direction. (*Id*. at 1658-1660, PgID 1674-1676.) Only after Culver threatened to discipline Teenier did he comply. (*Id*.)

As discussed below, Teenier was one of the individuals terminated for impeding Charter's investigation. At the hearing, the NLRB General Counsel produced Teenier as his key witness; many of the allegations claimed illegal conduct by Teenier and depended ***exclusively*** on Teenier's testimony. However, Teenier quickly proved an unreliable witness. His testimony was self-serving, uncorroborated, often contradictory, and full aggressive bias against Charter. After his termination, he waged a legal campaign against the company, first by filing his

own frivolous unfair labor practice charge, then by testifying falsely in support of the other unfair labor practice charges, and finally by filing his own civil lawsuit.[2] Teenier's ham-handed bias forced the ALJ and the Board to select isolated portions of Teenier's testimony while ignoring Teenier's own contradictions and the weight of the other evidence.

Teenier reassigns Field Auditors from Felker to Lothian

In approximately June or July 2014, Culver asked Teenier to reassign employees from Felker to Lothian, because Felker had 14 direct reports and Lothian only had 8. (*Id*. at 1690-1693, PgID 1706-1709.) Charter's model ratio of employees to supervisors is roughly 12 to 1, so Culver asked Teenier to balance the teams. (*Id.*) Culver did not tell Teenier which employees to reassign, just that the teams needed to be balanced. (*Id*.) Teenier defied Culver's instructions, despite admitting the clear business reason for balancing the teams. (*Id*.; 4/29/16 Hrg. Tr. at 525, PgID 535.) As he conceded at the hearing, Teenier eventually reassigned the employees to Lothian, though his motive was to pressure Lothian to retire. (4/28/16 Hrg. Tr. 412-413, PgID 421-422; 4/29/16 Hrg. Tr. 525-526, PgID 535-536.)

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[2] Charter requests that the Court take notice of Teenier's lawsuit, *Teenier v. Charter Communications LLC*, Case No. 16-cv-13226 (E.D. Mich., 2016), dismissed on Charter's motion for summary judgment with an award of costs to Charter (ECF No. 19).

Teenier transferred DeBeau, Schoof, and French from Felker to Lothian. (4/28/16 Hrg. Tr. 412-414, PgID 421-423.) Teenier gave contradictory testimony about why he chose French for the transfer, first claiming Felker wanted French off his team because of French's union involvement, but then testifying Felker was upset to lose French. (*Id.*) Rather than putting pressure on Lothian, Lothian was happy to have DeBeau, Schoof, and French transferred to his team, because they would help Lothian's numbers. (*Id.* at 413-414, PgID 421-422.)

A union passes out fliers in the Charter parking lot

In April 2014, French spoke with a representative of the International Brotherhood of Electrical Workers (the "Union") about taking some sort of "action" at Charter. (4/27/16 Hrg. Tr. 288-289, PgID 296-297; 4/26/16 Hrg. Tr.44-46, PgID 51-53.) The Union representative suggested instead that they try to build up interest in the Union. (4/27/16 Hrg. Tr. 288-289, PgID 296-297.) French worked up Union flyers and his wife's co-worker left them on cars at Charter's Bay City location in June 2014. (4/26/16 Hrg. Tr. 46-47, PgID 53-54.) There is no evidence anyone at Charter knew French had been involved in this activity. After the June flyers failed to drum up in interest in the Union, French suggested handbilling in person. (4/27/16 Hrg. Tr. 292-294, PgID 300-302.) On July 15, 2014, three Union representatives handbilled outside Charter's Saginaw, Michigan facility. (*Id.* at 294-296, PgID 302-304.) French did not participate. (*Id.*)

Three Charter supervisors—Felker, Chad Erskin, and Dave Jurek—observed the handbilling. (8/15/16 Hrg. Tr. 1615-1617, 1619-1621, PgID 1630-1632, 1634-1636; 8/16/16 Hrg. Tr. 1634-1636, PgID 1650-1652.) They did this solely to make sure that the union organizers did not trespass on Charter's property or block traffic. (*Id*.) When they satisfied themselves that these things were not occurring, they went back inside Charter's building. (*Id*.) None of the three supervisors wrote down the names of the employees who took handbills from the union organizers or made any other effort to identify employees who may have supported the union. (*Id*.)

Charter held management conference calls in response to the handbilling, primarily to determine approaches to the possible employee dissatisfaction that might relate to union activity. (4/28/16 Hrg. Tr. 380-381, PgID 389-390.) But there were no other instances of union activity after the July 15 handbilling so these calls dwindled and stopped by August 7. (5/31/16 Hrg. Tr. 699-700, PgID 710-711.)

Culver goes on a ride-out with French

As a relatively new director in 2014, Culver would spend 2-3 days each month riding along with field auditors (known as a "ride-out"), both for Culver to learn the Charter culture and to get to know those in his chain-of-command. (8/16/16 Hrg. Tr. 1660-1661, PgID 1676-1677.) In July 2014, Felker and Teenier

told Culver that French had some questions about Charter. (*Id.* at 1662, PgID 1678.) So, in July 2014, Culver went on a ride-out with French. (*Id.*) Both French and Culver testified that neither one mentioned or discussed the union or recent handbilling during the ride-out. (*Id.* at 1665, PgID 1681; 4/27/16 Hrg. Tr. 200, PgID 208.)

Months later, Lothian tells Human Resources that employees are abusing company time

On October 2, 2014, Lothian met with Stephanie Peters, senior human resources generalist, to talk about a receipt for a boot purchase. (8/15/16 Hrg. Tr. 1456, PgID 1471.) During this conversation, Lothian reluctantly told Peters that "things" were going on in the TQA department that Lothian felt were "not right." (*Id.* at 1457-1459, PgID 1472-1474.)

Lothian told Peters that when Teenier transferred DeBeau, Schoof, and French to Lothian's team, Felker told him that Teenier had been pulling them away from their work in the field to perform "special projects." (*Id.* at 1456-1458, PgID 1471-1473.) These "special projects" included:

(1) laying sod at Schoof's house on company time;

(2) working on a haunted house run by Pat Jozeska of Complete Auto, which was, at the time, a preferred vendor of Charter; and

(3) performing work at Teenier's rental unit. (*Id.*)

Lothian told Peters that Felker had driven by the house where DeBeau, Schoof, and French were laying sod on company time, and taken pictures with his cell phone that he had shown Lothian. (*Id*.) Lothian said he had spoken with Teenier about Felker's accusations. (*Id*. at 1458-1459, PgID 1473-1474). Lothian became emotional as he told Peters he feared retaliation from Teenier. (*Id.*)

Charter investigates Teenier and abuse of company time

Lothian's fears of retaliation were justified. Right after Lothian left, Teenier called Culver claiming Lothian was "paranoid" and needed coaching. (8/16/16 Hrg. Tr. 1694-1695, PgID 1710-1711.) After Peters told Culver about her conversation with Lothian, they agreed that Lothian's concerns were serious and that Charter should investigate. (*Id.* at 1694-1695, PgID 1710-1711; 8/15/16 Hrg. Tr. 1462, PgID 1477.)

Peters led the investigation, with input from Culver. Peters is a seasoned HR professional trained in investigations both through Ferris State University's criminal justice division and on-the-job training. (5/31/16 Hrg. Tr. 666, PgID 677.) During her employment with Charter, Peters prepared approximately 30-40 investigative reports. (5/31/16 Hrg. Tr. 667, PgID 678.)

Charter interviews Felker, who lies about the "special projects" and his relationship with Teenier

Peters and Culver began their investigation by interviewing Felker about special projects. (8/15/16 Hrg Tr. 1464-1467, PgID 1479-1482.) Felker first denied knowing about employees laying sod on company time, but later admitted he'd lied and did have information. (*Id.*)

Felker then claimed ***Teenier*** had asked ***him*** about employees cutting out of work early, which is why he had driven by Schoof's house. (*Id.* at 1465-1467, PgID 1481-1482.) Felker said Schoof, DeBeau, and Teenier had laid the sod after work one day, but he only knew this because Schoof had told him. (*Id.* at 1473-1476, PgID 1488-1491.) When Peters asked Felker if he had any pictures of the sod, Felker became defensive, telling Peters he had no pictures. (*Id.* at 1475, PgID 1490.) When Peters next asked Felker what he knew about employees working at Jozeska's haunted house, Felker admitted DeBeau had done so. (*Id.* at 1476-1477, PgID 1491-1492.) Felker also made the nonsensical claim that "special projects" meant when individuals ride together because one of their vehicles has broken down. (*Id.* at 1468, PgID 1483.) Felker denied talking to Lothian about the sod laying or special projects. (6/1/16 Hrg. Tr. 872, PgID 884.)

Culver and Peters rightly felt Felker was being untruthful and hiding things. Indeed, Felker admitted at the ALJ hearing that much of the information he provided during Peters' investigation was false, including that he had lied about the

sod laying incident and about having photos on his phone, and had misrepresented his personal relationship with Teenier. (*Id.* at 956, 944-946, PgID 968, 956-958; 4/29/16 Hrg. Tr. 529-32, 536, PgID 539-542, 546.)

Peters interviews Schoof, who hides information

Peters next interviewed Schoof. (8/15/16 Hrg. Tr. 1473, PgID 1488.) Schoof testified he was not honest with Peters, and that he "felt that I needed ***to*** come up with a story I guess to not lose my employment" over laying sod on company time. (6/2/16 Hrg. Tr. 1195, PgID 1208.) Schoof claimed DeBeau and Teenier had helped him lay sod at his house, though he did not reveal that Felker had been there. (8/15/16 Hrg. Tr. 1474-1475, PgID 1489-1490.) He also "guaranteed" that no pictures were taken of the sod. (*Id.*)

Peters interviews DeBeau and hears yet another version of events

Peters next interviewed DeBeau, who contradicted the others. (*Id.* at 1478, PgID 1493.) Unlike Felker and Schoof, DeBeau told Peters that "special projects" were when he and Schoof rode together because Schoof's phone was not working or when the auditors had to go to an apartment complex. (*Id.* at 1479, PgID 1494.) DeBeau also said he went over to Schoof's house to help lay sod, but hid the facts that (1) he had gone there on two separate days, and (2) that Felker had been there. (*Id.* at 1479-1480, PgID 1494-1495; 6/2/16 Hrg. Tr.1124, PgID 1137.)

DeBeau also admitted he had spent an hour at the haunted house while his vehicle was being looked at by Jozeska. (8/15/16 Hrg. Tr. 1479-1480, PgID 1494-1495.) When Peters asked DeBeau if he had ever done any work at Teenier's rental unit, DeBeau claimed he did not even know where it was; later in the interview, however, DeBeau said he had once gotten apples from a tree on the rental property. (*Id.* at 1481, PgID 1496.) DeBeau had no explanation for the contradiction. (*Id.*)

Peters interviews French, who goes after Lothian

The day after she spoke with DeBeau, Peters contacted French to set up an interview. Although he had not been named by Lothian, French was on the same team, and Peters thought he might be able to provide useful information. (*Id.* at 1483-1485, PgID 1498-1500.)

At the start of French's interview, Peters explained the investigation process and asked French to be honest and truthful. French leaned back in his chair, crossed his arms, and said "or what?" (*Id.* at 1489-1490, PgID 1504-1505.) French next told Peters that he knew "everything" about the investigation. (*Id.*) But when pressed, French could only provide basic information: something about pictures of people laying sod and a haunted house. (*Id.*) French told Peters that Lothian had told him the information, but it really matched up with what Peters had told Schoof. (*Id.*)

French then dramatically changed subjects and claimed Lothian had a gun during a safety check two days prior. (*Id*.) Peters—shocked—asked why French had not previously reported this information (which would have been a serious violation of company policy). (*Id*.) French said he didn't like human resources. (*Id.* at 1490-1491, PgID 1505-1506.) French added that Lothian had previously brought a gun on company property, claiming Lothian had shown people at work a gun in his trunk of his car that he said was a birthday gift. (*Id.*) French claimed he was a contractor for Charter at the time this occurred. (*Id.*)

Ultimately, French had very little relevant information about the actual subject matter of the investigation. (*Id.* at 1490-1493, PgID 1505-1508.) He repeated Teenier's claim that Lothian was paranoid with respect to Teenier. (*Id.*)

Peters questions Lothian about the gun allegations

Peters next called Lothian and asked whether he had shared any information about the investigation with French. (*Id.* at 1497-1498, PgID 1512-1513.) Lothian told Peters that he did not talk to French except to give him work-related information. (*Id.*)

Peters also asked Lothian whether he recently had brought a gun to work. (*Id.* 1502-1503, PgID 1517-1518.) Lothian said no, but that many years before he had brought a gun to work in his personal vehicle. (*Id.*) Lothian had received the gun for his birthday because he was an avid hunter, had brought it into the

workplace to show some people because he was excited about the gift, and had been disciplined for it. (*Id.*) Lothian unequivocally denied having a gun when he met with French. (*Id.*)

Teenier provides more contradictory information

Peters and Culver then met with Teenier. (*Id.* at 1506, PgID 1521.) Teenier gave yet another definition of "special projects," claiming it meant retrieving cable boxes or assisting security with tasks that required a ladder. (*Id.* at 1506-1507, PgID 1521-1522.) Teenier said he pulled employees from the field to perform "special projects" whenever he felt the need arise. (*Id.*)

Teenier also told Peters that both Schoof and DeBeau called him and told him about Peters' investigation and their interviews with her. (*Id.* at 1507-1508, PgID 1522-1523.)

Teenier admitted he was aware of Charter employees laying sod, but claimed it had been done after hours. (*Id.* at 1508-1509, PgID 1523-1524.) Teenier told Peters that Schoof and DeBeau were at Schoof's house, but also hid that Felker had been there. (*Id.*) Teenier admitted he had approved DeBeau to go to his friend Jozeska's haunted house and perform whatever work needed to be done there. (*Id.* at 1510, 1512, PgID 1525, 1527).

Teenier denied that Lothian had spoken to him about any concerns regarding abuse of company time. (4/29/2016 Hrg. Tr. 585, PgID 595.) Teenier also denied

he had any personal relationships with the employees who reported to him (including Felker, who later admitted they were close). (8/15/16 Hrg. Tr.1509-1510, PgID 1524-1525.)

Peters interviews the remaining relevant witnesses

Peters interviewed several other employees, who told her they had heard: "things that were going on" involving Teenier; Teenier regularly pulled employees for inappropriate "special projects"; Charter was investigating Schoof and DeBeau for laying sod and that someone had taken pictures of it; and people were fearful Teenier would retaliate against them. (*Id.* at 1514-1515, 1524-1527, PgID 1529-1530, 1539-1542.) When Peters interviewed Jozeska, he admitted DeBeau had worked at the haunted house during work hours. (*Id.* at 1530-1531, PgID 1545-1546.)

Peters then re-interviewed Felker, giving him a chance to be forthcoming. (*Id.* at 1532, PgID 1547.) Instead of admitting he had been at Schoof's house when Schoof, DeBeau, and Teenier were laying sod, Felker folded his arms across his chest and said "I told you everything I needed to say." (*Id.* at 1533, PgID 1548.) Peters found him angry, agitated, and uncooperative. (*Id.*)

Peters determines French's claim about Lothian having a gun is false

Because French had claimed he was working as a contractor for Charter when Lothian brought a gun to work on his birthday, Peters reviewed employment

records to determine the dates when French was a contractor for Charter. (*Id.* at 1535-1536, PgID 1550-1551.) They didn't match when Charter had disciplined Lothian for bringing a gun to the workplace. *(Id.*) Peters concluded, based on her review of these records, her evaluation of the witness interviews, and all the circumstances of the investigation, that French was trying to discredit Lothian and get him in trouble by falsely claiming Lothian: (1) had violated Peters' confidentiality directive; and (2) had brought a gun to work. (*Id.* at 1537-1549, PgID 1552-1564.)

Charter terminates Teenier, Felker, DeBeau, Schoof, and French

Peters recommended Charter terminate all five managers and employees because she concluded they had withheld information and deliberately interfered with the investigation. She also concluded Felker, Teenier, Schoof, and DeBeau likely had engaged in non-work activities on company time. (*Id.* at 1555-1557, PgID 1570-1572; 5/31/16 Hrg. Tr. 660-666, PgID 671-677; Resp. Exs. 9-14, PgID 2143-2199.) Finally, Peters concluded French had lied about Lothian. (*Id.*) Peters credited Lothian's version of events because he had nothing to gain personally by making the accusations. (*Id.*) He also remained consistent in the version of events he shared with Peters—unlike the other witnesses. (*Id.*) Culver also credited Lothian because the complaint he raised—employees laying sod on company

time—was very specific and did not seem like the type of accusation an employee would falsify. (8/16/16 Hrg. Tr.1698-1699, PgID 1714-1715.)

Charter, based on Peters' investigation and recommendations, terminated Teenier, Felker, DeBeau, Schoof, and French on October 14, 2014. (*Id.* at 1706-1707, PgID 1722-1723.)

French files timely unfair labor practice charges regarding his termination and an alleged threat to terminate him

On November 3, 2014, French filed an Unfair Labor Practice Charge alleging he was terminated after being "outed" as a union "mastermind." (11/3/14 Charge Against Employer (GC Ex. 1(a)), PgID 1924.) On November 18, 2014, French filed his First Amended Charge alleging Lothian had told him on September 30, 2014 that Charter was aware of his union activities and threatened him with termination. (11/18/14 Am. Charge Against Employer (GC Ex. 1(d)), PgID 1919.).

A year later, French files an amended charge with unrelated and untimely allegations

On October 29, ***2015***, French filed his Second Amended Charge listing 17 completely new allegations, including:

- On July 15, 2014, three supervisors— Jurek, Erskin, and Teenier— engaged in "coercive surveillance" of unidentified employees who took handbills at Charter's Saginaw facility (Compl, (GC Ex. 1(s) 3), PgID 1885);

- On July 16, 2014, Teenier gave French the impression that his union activities were under surveillance because he told French that his name had come up as someone who was involved with the Union (*id.* at 4, PgID 1886);

- On July 16, 2014, Teenier solicited grievances from French by telling him that if he had any concerns about work, French could come to him directly (*id.*);

- On July 16, 2014, Teenier threatened French with closer supervision by telling him that he was being looked at closely by members of upper management (*id.*);

- On July 16, 2014, Teenier "coercively interrogated" French by asking him if he knew of any employees who were involved with the union (*id.*);

- On July 19, 2014, Culver subjected French to closer scrutiny when he went on a ride-out with him (*id.* at 5, PgID 1887); and

- In late July 2014, Teenier isolated French, Schoof, and DeBeau by reassigning them to rural areas (*id.*).

(2d Am. Charge Against Employer (GC Ex. 1(m)), PgID 1903-1905).

The Second Amended Charge claimed Teenier, Felker, Jurek, Erskin, Culver, and Peters engaged in the alleged improper conduct, even though French had not identified ***any*** of them in his timely charges. (*Id.*) French conceded he did not have personal knowledge about any of the new allegations in the Second Amended Charge, and that the Board had asked him to amend it. (4/27/16 Hrg. Tr. 260-265, 269-272, PgID 268-273, 277-280.)

On January 26, 2016, the General Counsel issued the Complaint in this matter, including the untimely allegations. (Compl. (GC Ex. 1(s) 3-5), PgID 1885-1887.)

The ALJ's ruling

This matter went before ALJ Arthur J. Amchan at a hearing held on April 26-29, May 31-June 3, and August 15-16, 2016. ALJ Amchan issued an order on November 10, 2016, finding that Charter had violated the Act by:

- Discharging French;
- Giving French the impression of surveillance when Teenier spoke to him on July 16, 2014;
- Subjecting French to close scrutiny via Culver's July 2014 ride-out;
- Creating the impression of surveillance when Lothian spoke to French on September 30, 2014; and
- Reassigning French, Schoof, and DeBeau outside of Saginaw.

ALJ Amchan found that Charter had not violated the Act by discharging Schoof and DeBeau, or by allegedly engaging in surveillance of the July 15, 2014 handbilling. The ALJ also held the following allegations time-barred based on Section 10(b) of the Act:

- That Charter's rule on "Professional Conduct" was overly broad;
- That Teenier's alleged July 16, 2014 discussion with French constituted solicitation of grievances or a threat of closer supervision;

- That Teenier's alleged discussions with employees in July and August 2014 constituted coercive interrogation, created an impression of surveillance, and interfered with Union activity; and

- That Lothian's September 30, 2014 discussion with French was coercive interrogation.

(3/27/18 NLRB Decision & Order, PgID 2383-2408.)

The Board's Decision and Order

Both Charter and the General Counsel filed exceptions to the ALJ's ruling with the Board. On March 27, 2018, the Board issued the Decision and Order, upholding the ALJ's findings to the extent they were against Charter and reversing the ALJ on every issue that the ALJ had found for Charter. The Board's and ALJ's rulings were as follows:

Compl.	Allegation	ALJ	Board
6	Overly broad rule on "Professional Conduct"	Dismissed as untimely	Timely, no ruling on merits[3]
7	On 7/15/14, Teenier, Jurek, and Erskine engaged in coercive surveillance of employees	Timely, dismissed on merits	Violation

[3] On September 28, 2108, the NLRB issued an Order to Show Cause why this allegation should not be remanded to the ALJ for further proceedings. The General Counsel requested the Board dismiss this paragraph of its Complaint, but because the General Counsel's request was late, the Board rejected it. The Board has not yet ruled on the Order to Show Cause.

Compl.	Allegation	ALJ	Board
8(a)	7/16/14, Teenier gave impression of surveillance by telling employees they were under surveillance	Violation	Violation
8(b)	7/16/4, Teenier solicited grievances from employees	Dismissed as untimely	Violation
8(c)	7/16/14, Teenier threatened employees with closer supervision	Dismissed as untimely	Violation
8(d)	7/16/14, Teenier coercively interrogated employees about union sympathies at Saginaw	Violation	Violation
10	7/17/14, Culver subjected employees to closer scrutiny	Violation	Violation
11(a)	9/30/14, Lothian created impression of surveillance by telling employees they were outed as union supporters	Violation	Violation
11(c)	9/30/14, Lothian threatened employees for union activities	Violation	Violation
12	Peters issued overly broad directive not to discuss investigation	Dismissed on merits	Dismissed as untimely
13	7/14, isolation of French, Schoof & DeBeau by remote reassignment	Violation as to French; dismissed as to Schoof and DeBeau	Violation as to French

Compl.	Allegation	ALJ	Board
15	10/14/14 discharged French, Schoof & DeBeau	Violation as to French; dismissed as to Schoof & DeBeau	Violation for all

Charter filed a motion for reconsideration with the Board on June 24, 2018, specifically requesting the Board reverse its decisions on the timeliness issues pursuant to Section 10(b) of the Act. 29 U.S.C. § 160(b). The Board denied that motion on June 7, 2018. (6/7/18 Order Denying Motion for Reconsideration, PgID 2428-2429.) This timely appeal followed.

SUMMARY OF THE ARGUMENT

The Board's conclusions rest on three errors:

1. Applying the wrong legal standard to the termination, asking whether the ***Board*** felt the employees had engaged in misconduct, rather than whether ***Charter*** reasonably believed at the time that the employees had engaged in misconduct. Under the correct standard, the Board's conclusions are not supported by substantial evidence.

2. Selectively highlighting choice testimony supporting the Board's conclusions while ignoring decisive contradictions, counterevidence, and the ALJ's credibility determinations, the result of which were conclusions not supported by substantial evidence from the whole record.

3. Applying the wrong legal standard to the untimely allegations to bootstrap them into this dispute.

The Board's conclusion that anti-union animus motivated Charter's discharge of French, Schoof, and DeBeau was not supported by substantial evidence. Schoof and DeBeau had ***zero union involvement***, yet the Board held that Charter fired four people (Schoof, DeBeau, Teenier, and Felker), to cover up the retaliatory discharge of French. The Board ignored Charter's persuasive demonstration that it would have terminated French, Schoof, and DeBeau regardless based on their dishonesty and insubordination. Instead, it substituted Charter's judgment at the time with its own post-hoc judgment.

The Board also erred by considering the untimely allegations, rewriting established Board and federal court precedent. Finally, the Board erred in finding against Charter on the remaining charges without substantial evidence.

STANDARD OF REVIEW

This Court "reviews the [Board]'s 'legal conclusions de novo and its factual findings under a substantial evidence standard.'" *Vanguard Fire & Supply Co. v. N.L.R.B.*, 468 F.3d 952, 956 (6th Cir. 2006) (citations omitted). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Dow Elastomers, LLC v. N.L.R.B.*, 296 F.3d 495, 500 (6th Cir. 2002).

While this standard is deferential, it "does not permit the Board to ignore relevant evidence that detracts from its findings." *GGNSC Springfield, LLC v. N.L.R.B.*, 721 F.3d 403, 407 (6th Cir. 2013). The "whole record" must be considered, including "whatever in the record fairly detracts from [the] weight" of the Board's findings. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). The Board's findings are "less likely to rest upon substantial evidence" where the Board has "misconstrue[d] or fail[ed] to consider important evidence." *Id.* Similarly, it is "neither logical nor reasonable to rely on…'weak and suspect' testimony as substantial evidence." *Union Carbide Corp. v. N.L.R.B.*, 714 F.2d 657, 662 (6th Cir. 1983); *see also N.L.R.B. v. Arkansas Grain Corp.*, 392 F.2d 161, 167 (8th Cir. 1968) ("[U]ncorroborated testimony of an untrustworthy and interested witness, who stands to profit from a back pay award, may be held under such facts and circumstances not to constitute substantial evidence on the record considered as a whole.").

The Board decision's is also not entitled to deference if it "rest[s] on erroneous legal foundations." *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 539 (1992). If the Board errs in determining or applying the proper legal standard, this Court may rule that its order has "no reasonable basis in law." *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497 (1979).

ARGUMENT

I. The Board erred by concluding that Charter terminated French, DeBeau, and Schoof due to alleged Union activity.

In order to establish that an employer violated Section 8(a)(3) by discharging an employee, the Board generally requires an initial showing that the employee's protected conduct was a "motivating factor" in the employer's decision. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Praxair Distribution, Inc.*, 357 NLRB 1048 (2011). There must be evidence that: (1) the employee was engaged in protected activity; (2) the employer had knowledge of the protected activity; and (3) the employer bore animus toward the employee's protected activity. *Praxair*, 357 NLRB at 1048 n. 2 (evidence did not establish that animus was a motivating factor). Should the General Counsel meet these elements, the burden shifts to Charter to prove that it would have discharged the employee even in the absence of their union activity. *Wright Line*, 251 NLRB at 1085. This decision will not be credited, however, if the General Counsel shows it is pretextual. *Id.*

The Board performed the wrong inquiry into the terminations. In reviewing whether Charter's proffered reasons for discharging the employees was pretext, the Board should have examined whether Charter reasonably believed the employees had engaged in misconduct; instead, it looked to whether ***the Board*** believed the employees ***actually*** had engaged in the misconduct. This was error. *See Affiliated*

Foods, 328 NLRB 1107, 1107 & n.1 (1999) (not necessary for employer to prove misconduct actually occurred; demonstrating reasonable, good faith belief employees had engaged in misconduct was sufficient); *GHR Energy*, 294 NLRB 1011, 1012-1013 (1989) (respondent met *Wright Line* burden by showing employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in misconduct); *Chinese Daily News*, 346 NLRB 906, 964 (2006) ("it is not the objective truth of circumstances, but rather what the Respondent's motivations were at relevant times that determines the legality of the discharge").

Under the correct standard, substantial evidence does not support the Board's conclusion Charter terminated French, DeBeau, and Schoof out of anti-union animus.

A. French's termination did not violate the Act.

While there is evidence French engaged in minimal union activity—and that Charter knew about French's activity—that knowledge, without causation, is not enough. It is beyond dispute French was obstructive during investigatory meeting with Peters, and Peters found French had lied several times to attack and undermine Lothian (who had blown the whistle on French's friends). Peters' conclusion was reasonable based on the information available to Charter at the time, including her first-hand interviews with all the witnesses and a review of relevant documents.

Under the proper test, the Board's conclusion is not supported by substantial evidence. The Board relied on select testimony from admittedly dishonest witnesses, including French, who started the investigatory interview with a hostile attitude, and then told multiple, contradictory stories about key facts. This is not substantial evidence Charter lacked a reasonable belief French had obstructed the investigation, and that the real reason for French's discharge was his union activity.

1. Peters reasonably concluded French had lied about Lothian telling him "everything."

Peters reasonably believed French had lied when he said Lothian had told him "everything" about the investigation. She believed Lothian when he denied telling anything to French, especially because French didn't actually know anything about the investigation (other than the general topics, like Peters had told Schoof). The Board concluded Peters was wrong based solely on double-hearsay testimony from Schoof, who testified that French had called him and told him about the alleged Lothian conversation. But: ***French himself denied telling this to Schoof***. (4/27/16 Hrg. Tr. 246-248, PgID 254-256; 6/2/16 Hrg. Tr. 1197-1198, PgID 1210-1211). Further, Schoof told contradicting stories on this point, and the ALJ found Schoof to have no credibility.[4] (3/27/18 NLRB Decision & Order 21

[4] Schoof testified that French told him he spoke to Lothian on the phone; but when interviewed by Peters, Schoof said that French had talked to Lothian in person. (6/2/16 Hrg. Tr. 1197, PgID 1210.) He also claimed the conversation with Peters

PgID 2403 ("Schoof's testimony is generally confusing and unreliable"); 6/3/16 Hrg. Tr. 1276, PgID 1290 ("Schoof testified that he has a terrible memory.").) The contradicted, uncorroborated double-hearsay testimony of a "confusing and unreliable" witness with an admittedly "terrible memory" is not substantial evidence that French was telling the truth to Peters, ***let alone*** that Peters was being unreasonable when she concluded otherwise. *See Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 230 (1938) ("Mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Local Union No. 948, Int'l Bhd. of Elec. Workers, (IBEW), AFL-CIO v. N.L.R.B.*, 697 F.2d 113, 117 (6th Cir. 1982) ("[T]his court will not be bound by the Board's conclusions when the Board's determinations go beyond what good sense permits.").

2. Peters reasonably concluded French had lied about Lothian bringing guns to work.

Peters also reasonably concluded French had lied about Lothian bringing guns to work. Peters found Lothian forthright about the gun allegations, particularly since he volunteered his years-old discipline for bringing a gun into the company parking lot. The documentary records supported Lothian and contradicted French. As for French, he admitted to Peters he had given her

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took place a week after his own interview, meaning it occurred well after French and Peters met. (6/3/16 Hrg. Tr. 1283, PgID 1297.)

incomplete information in response to her questions. (4/27/16 Hrg. Tr. 242-245, PgID 250-253.) In light of the information available to her, including her observations of the witnesses, Peters concluded, reasonably, that French had heard about the past incident with Lothian and had tried to weaponize it against him. (8/15/16 Hrg. Tr. 1537-1549, PgID 1552-1564.)

The Board reached a different conclusion by crediting the unbelievable testimony of French over Peters. The ALJ had found French's testimony "confusing and/or contradictory about what Lothian said about guns, when Lothian made these statements and when he saw Lothian with a gun." (3/27/18 NLRB Decision & Order 18, PgID 2400.) That is an understatement:

French on 10/2/14	Lothian ***did*** discuss a gun during the safety check. (10/6/14 Incident Invest. Report (Resp. Ex. 9) 10, PgID 2152) French saw Lothian with a gun while French was a contractor. (*Id.*; 8/15/16 Hrg. Tr. 1490-1491, PgID 1505-1506.)
French Affidavit, 11/14/14	Lothian ***did not*** discuss a gun during the safety check on September 30, 2014. (4/27/16 Hrg. Tr. 226-227, PgID 234-235.)
French Suppl. Affidavit, 6/23/15	Lothian ***did*** discuss a gun during the safety check. (*Id.* at 243, PgID 251.)
French at Hearing, Day 1	Lothian "brings guns to work" and "showed me a derringer and then slid it into his pocket." (4/26/16 Hrg. Tr. 72, PgID 79.)
French at Hearing, Day 2	Lothian ***did not*** discuss a gun during his safety check. (4/27/16 Hrg. Tr. 237, PgID 245.)

When confronted about his inconsistent testimony at the hearing, French simply clammed up, claiming Respondent's counsel was "trying to trip [him] up." (4/27/16 Hrg. Tr. 244-245, PgID 252-253.) Notably, French did ***not*** testify at the hearing that he'd told Peters that he was a contractor for Charter during Lothian's previous incident with a gun (because Peters had already proved this wrong). French's wildly inconsistent versions of what happened, along with his hostile behavior during the investigation, only prove Peters' conclusion was reasonable.

Charter's reasonable belief French had lied during the investigation meets its burden under *Wright Line* that it would have discharged French regardless of any union activity. *See McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (*citing Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on ***mistaken*** belief does not constitute unfair labor practice as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity)). The Board's contrary conclusion resulted from the wrong test, did not rest on substantial evidence, and should be reversed.

B. DeBeau's and Schoof's terminations did not violate the Act.

The ALJ held that Charter did not violate the Act by terminating DeBeau nor Schoof, because neither had engaged in any protected activity, and because Charter was reasonable to terminate them based on Peters' conclusions. The Board erred

by reversing these findings, again applying the wrong test and lacking substantial evidence.

1. Neither DeBeau nor Schoof engaged in protected activity.

It was undisputed neither DeBeau nor Schoof engaged in union activity—both admitted this at the hearing. (6/2/16 Hrg. Tr. 1098, 1231, PgID 1111, 1244.) The theory advanced by the Board—that Charter believed DeBeau and Schoof were involved in union activity or otherwise supported a union—is not supported by substantial evidence.

DeBeau testified he was not aware of anyone at Charter believing he had engaged in union activity at Charter. (6/2/16 Hrg. Tr. 1098, PgID 1111.) The only evidence to the contrary came from Teenier's hearsay testimony that another manager had identified DeBeau as "involved" with the union. (4/28/16 Hrg. Tr. 385, PgID 394.) Teenier's biased testimony on this point, like the bulk of his testimony, simply is not credible. Teenier himself testified he never believed DeBeau was involved with union activity and he never heard anyone at Charter say it needed to fire DeBeau because of his union activity. (4/29/16 Hrg. Tr. 502, 512, 515-517, PgID 512, 522, 525-527.) Even if Teenier could be believed, such an unspecific statement is far too tenuous a thread on which to hang a violation, when DeBeau clearly lied in his interview and undoubtedly did personal work on company time.

Similar to DeBeau, there is no credible evidence Charter thought Schoof was involved in union activity. The only evidence tying Schoof to the union was Schoof's testimony he once told Teenier he supported unions—which Teenier (the General Counsel's key witness) ***denied took place***. (6/3/16 Hrg. Tr. 1243-1244, PgID 1257-1258; 4/28/16 Hrg. Tr. 458, PgID 467.). Teenier did not believe Schoof was involved in union activity, and testified no one in Charter management ever targeted Schoof because of any supposed union activity. (4/29/16 Hrg. Tr. 502, PgID 512.) Teenier was not involved in the decision to terminate Schoof. So, the only evidence Charter believed Schoof supported unions was the contradicted, uncorroborated testimony of a "confusing and unreliable" witness with an admittedly "terrible memory" who admittedly lied to save his job. There is also no nexus between this supposed belief and the termination. The Board erred by upending the ALJ's decision to reject this allegation.

2. It was reasonable for Charter to discharge DeBeau and Schoof for performing non-company work on company time.

Charter also demonstrated that it would have discharged DeBeau and Schoof notwithstanding any purported protected activity because Charter reasonably believed they had performed non-Charter work on company time and were dishonest about it during their interviews with Peters. *Wright Line*, 251 NLRB at 1089; *APX International v. N.L.R.B.*, 144 F.3d 995 (6th Cir. 1998). The ALJ

correctly reached this conclusion based on all the evidence before him, after weighing the credibility of the witnesses. It was error for the Board to reverse these findings. *See Jolliff v. N.L.R.B.*, 513 F.3d 600, 615 (6th Cir. 2008) ("The ALJ, who credited the testimony of the employees, was the only fact-finder with the benefit of direct observation. Thus, his determination of the matter is persuasive."); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. N.L.R.B.*, 844 F.3d 590, 598 (6th Cir. 2016) (Board "cannot 'ignore relevant evidence that detracts from its findings,'" and ALJ's findings "'are part of the record we must review' and therefore are considered 'to the extent that they reduce the weight of the evidence supporting the Board's conclusion.'") (citations omitted).

a. Peters reasonably believed DeBeau was dishonest and had misused company time.

The ALJ correctly found Charter had a good reason to fire DeBeau for working on the haunted house run by Jozeska and for laying sod at Schoof's house. (11/10/16 ALJ Decision 17, PgID 2257 ("In its totality, the evidence suggests that when Felker discovered Schoof and DeBeau working at Schoof's, they were still on the clock."); *id.* at 20, PgID 2260; 6/1/16 Hrg. Tr. 820, PgID 832.) DeBeau admitted he had worked at the haunted house on three occasions, but only once had permission. (6/2/16 Hrg. Tr. 1138-1140, PgID 1151-1153; 11/10/16 ALJ Decision

17, PgID 2257.) Supporting Charter's conclusion was the fact DeBeau ***admitted*** he had hidden critical information from Peters about how many times he had worked at Schoof's house and whether Felker had been there. (6/2/16 Hrg. Tr. 1124, 1134, 1142, PgID 1137, 1147, 1155; 10/6/14 Incident Invest. Report (Resp. Ex. 9) 8-9, PgID 2150-2151.)

The Board improperly reversed the ALJ by—again—applying an incorrect standard, then selecting pieces of the record that fit its broader narrative while ignoring the key contradictory evidence. The ALJ had concluded Felker was being untruthful about these incidents to Peters (and at the hearing) to "try[] to protect [Schoof and DeBeau] from disciplinary measures…." (11/10/16 ALJ Decision 20, PgID 2260). The Board reversed this credibility determination, without basis, crediting Felker's testimony over Peters' on this point for no apparent reason. (3/27/18 NLRB Decision & Order 8-9, PgID 2390-2391.) This was error. *See Jolliff*, 513 F.3d at 615; *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am*, 844 F.3d at 598.

b. Peters reasonably believed Schoof was dishonest and misused company time.

The ALJ also correctly found Charter would have discharged Schoof notwithstanding any protected conduct. (11/10/16 ALJ Decision 21-22 PgID 2261-2262); *Wright Line*, 251 NLRB at 1083. Charter discharged Schoof because

it believed he was dishonest during his interview with Peters. (*Id.* at 19-20, PgID 2259-2260.) As discussed above, companies have the clear right to discharge an untruthful employee. *6 West Ltd. Corp. v. N.L.R.B.*, 237 F.3d 767, 778 (7th Cir. 2001) (*quoting EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000)).

Charter's conclusion about Schoof's honesty was reasonable because—among other reasons—Schoof ***admitted*** he had not been honest in his interview with Peters, testifying: "[I] felt that I needed to come up with a story I guess to not lose my employment." (6/2/16 Hrg. Tr. 1195, PgID 1208.)

As with DeBeau, Peters had a logical and legitimate reason to believe Schoof was not being truthful with her. Any perceived misconduct (as opposed to Schoof's non-existent union activity) is a legitimate reason for his discharge. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. N.L.R.B.*, 514 F.3d 574, 585 (2008); *Chinese Daily News*, 346 NLRB at 946; *Affiliated Foods*, 328 NLRB at 1107 & n.1. As the ALJ properly concluded, Peters' reasonable belief was based on the findings of her investigation—findings that turned out correct when Schoof admitted he had provided inaccurate and inconsistent information.

II. The Board erred by considering the untimely allegations in the Complaint.

The Board incorrectly held that untimely allegations in complaint paragraphs 7, 8(a)-(d), 10, and 13 were timely—a legal conclusion that this Court reviews *de novo*. *Vanguard Fire*, 468 F.3d at 956. These alleged acts occurred over ***15 months*** before French first raised them (without personal knowledge) in his Second Amended Charge. (3/27/18 NLRB Decision & Order 2, PgID 2384.) Section 10(b) of the Act bars the Board from issuing a complaint based upon any unfair labor practice alleged to have occurred more than six months prior to being alleged in a charge with the Board. *See* 29 U.S.C. § 160(b); *Local Lodge 1424 v. N.L.R.B. (Bryan Mfg.)*, 362 U.S. 411 (1960) (invalidating unfair labor practice findings, which are "inescapably grounded on events predating" the 6-month period); *Chambersburg Cty. Mkt.*, 293 NLRB 654 (1989) ("Strict adherence to the 10(b) limitation is prescribed by authoritative precedent and by legislative history.") The Board may not consider untimely allegations unless they are legally and factually "closely related" to an otherwise timely filed charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988).

To determine whether allegations are "closely related", the Board applies a set of three factors articulated in the *Redd-I* case: "(1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge; (2) whether the otherwise untimely allegations of

the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations." *Wge Fed. Credit Union*, 346 NLRB 982, 983 (2006) (citing *Redd-I*, 290 NLRB at 1118). The Board here paid lip service to the *Redd-I* test but stripped it of any meaning. In particular, the Board ignored its clear precedent that allegations are ***not*** closely related simply because they all "pertain to events that occurred during or in response to the same union campaign." *SKC Electric, Inc.*, 350 NLRB 857, 858 (2012).

A. The untimely allegations did not "involve the same legal theory" as timely allegations.

For the first factor of the *Redd-I* test, the Board errantly concluded that all the untimely and timely allegations involved the same legal theory because they focused on conduct that "discouraged employees from engaging in protected activities in violation of Section 8(a)(1)." (3/27/18 NLRB Decision & Order 2-3, PgID 2384-2385.) This is not a real connection—it is an oversimplified and abstract one, which is insufficient in this context. *See Smithfield Packing Co., Inc.*, 344 NLRB 1, 10 (2004) (holding unlawful discharge allegation not "closely related" to solicitation and distribution allegations where they arose from different sequence of events, even though legal theory for both violations was

discrimination based on union activity); *Reebie Storage & Moving Co. v. N.L.R.B.*, 44 F.3d 605, 609 (7th Cir. 1995) (finding allegations untimely despite general connection to timely allegations, noting that "at certain levels of legal abstraction, any two allegations are capable of being deemed 'related.'"); *Drug Plastics & Glass Co. v. N.L.R.B.*, 44 F.3d 1017, 1021-1022 (D.C. Cir. 1995) ("[A]llegations which are related by mere legal theory are not 'closely related' for purposes of § 10(b)….").

B. The Board erred in finding a factual nexus between the timely and untimely charges.

The Board found a factual nexus between the timely and untimely allegations because they "represent[ed] a progression of events relating to [Charter's] response to the union campaign that culminated in the discharge of French." (3/27/18 NLRB Decision & Order 3, PgID 2385). Once again, the Board improperly found the allegations closely related "merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign." *SKC Electric*, 350 N.L.R.B. at 858 (*citing Carney Hospital*, 350 NLRB 627, 630 (2007)). There also is no factual support for this conclusion for the following reasons.

First, there is an undeniable break in time between the events in the timely and untimely allegations. The untimely allegations all occurred in July 2014; there

was no further union activity after July 15, and Charter stopped communicating with its employees about union activity and holding management calls about union activity by August 7, 2014. (*Id*. at 1, 14, PgID 2383, 2396.) After another two months of no activity, the timely allegations took place on September 30 and in early October 2014. (*Id*. at 2, PgID 2384.) The Board erred by discounting this clear temporal break. *See Wge Fed. Credit Union*, 346 NLRB at 983 (timely and untimely allegations were not closely related because untimely allegation involving a threat occurred during union campaign, and timely allegation of retaliatory discharge took place after union campaign had ended).

Second, the allegations are of a different nature. The timely allegations all stem from Lothian's complaint on September 19, 2014, that Teenier, Schoof, and DeBeau were laying sod at Schoof's house during work time. (*Id*. at 2, PgID 2384.) Lothian spoke with French about his complaint to human resources and it was during this adversarial conversation, on September 30, that Lothian allegedly told French that he had been "outed as the union mastermind" and that people were going to get fired for doing non-company work on the clock. (*Id*.) The company then investigated Lothian's complaint and terminated five employees based on that investigation (including two managers). (*Id*.) The untimely allegations had nothing to do with the investigation into Lothian's complaint, nor did the topic of the union or any union activity arise during the investigation.

Third, the allegations focus on the conduct of different actors. The timely allegations relate to Lothian allegedly surveilling and threatening French with discharge, and to Charter's discharge of French after the investigation. In contrast, the untimely allegations concern conduct by multiple supervisors other than Lothian. Indeed, most of the untimely allegations are based on alleged conduct by Teenier—***one of the persons Charter was investigating and whom Charter ultimately discharged***. (*Id.* at 1-2, PgID 2383-2384.) This is an absolutely critical distinction that the Board ignored. *See Wge Fed. Credit Union*, 346 NLRB at 983 (no factual similarity between timely and untimely allegations where they implicated different individuals); *MECO Corp. v. N.L.R.B.*, 986 F.2d 1434, 1437 (D.C. Cir. 1993) (anti-union comments of supervisor did not establish animus of discharge of union adherent where there was "no showing that [supervisor] played any role in [the] discharge"); *Hudson, Inc.*, 275 NLRB 874, 874-875, 1985 WL 45624 (1985) (supervisor's anti-union remarks did not "establish the requisite element of anti-union animus" where he "played no part in [employer's] decision to lay off the employees"); *Ross Stores, Inc. v. N.L.R.B.*, 235 F.3d 669, 674 (D.C. Cir. 2001) (allegations not closely related where perpetrator in untimely allegation was not involved in timely allegation of unlawful discharge).

Finally, the conduct did not have a similar purpose. Under the Board's theory, Charter engaged in the untimely conduct in July to identify French as a

union supporter and then terminated him in October as part of a plan to "thwart" union activity. (3/27/18 NLRB Decision & Order 3, PgID 2385.) However, the alleged union activity had ended by August, so there was nothing for Charter to "thwart." (*Id.*)

As the Board and circuit courts have held, it is insufficient to establish a factual nexus merely because of "the happenstance that the unrelated two violations occurred during a single campaign and involved the same pro-union employee." *Ross Stores, Inc.*, 235 F.3d at 673. Yet that is all the Board relied on here.

C. Charter did not raise similar defenses to the timely and untimely allegations.

The Board erred by finding this prong supported ruling against Charter's 10(b) defense. Charter's defenses to the untimely allegations are different from the defenses it has raised to the timely allegations. Charter has asserted a *Wright Line* defense to the allegations surrounding the employee terminations, as Charter would have discharged them even in the absence of protected conduct. 251 NLRB at 1083; *APX International*, 144 F.3d at 995. Charter's defense to the untimely allegations are either that the conduct did not occur or that the conduct did not reasonably tend to interfere with Section 7 rights.

The Board noted that this third prong of the *Redd-I* test was concerned (at least in part) with whether "a reasonable respondent would have preserved similar

evidence and prepared a similar case in defending against the untimely allegations as it would in defending against the timely allegations," relying on *Smith's Food & Drug Centers, Inc.*, 361 NLRB 1216, 1217 n.5 (2014). (3/27/18 NLRB Decision & Order 4-5, PgID 2386-2387.) That case demonstrates the Board's error.

In *Smith's Food*, the timely allegation was that the employer had denied an employee's right to have a union representative of her choice at an investigatory interview, in violation of the employee's rights under *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The untimely allegations were that the interview violated two other aspects of *Weingarten* because the employer had prohibited the employee from conferring with her employer-appointed union representative before the interview, and had ordered the representative not to speak during the interview. *Smith's Food*, 361 NLRB at 1217. Therefore, the employer's defenses to both timely and untimely charges "would be limited to arguing over what was (or was not) said during the interview," and whether that violated *Weingarten*. *Id.*

The situation here is drastically different. The timely and untimely allegations do not relate to the same event; there was no reason Charter would have been aware of future charges related to different events involving different actors at different times and different locations than the timely allegations. The Board's circular and hindsight logic that Charter should have been aware of them because they "show that [Charter's] discharge of French was motivated by union animus"

obviously makes no sense. (*Id.* at 4, PgID 2386.) By this reasoning, *every* allegation betraying anti-union sentiment would qualify under this factor, eviscerating the *Redd-I* test.

Where, as here, there is such a "tenuous relationship between the legal theories underlying the two allegations, the different factual events underlying the allegations, and the absence of common or similar defenses to the allegations," the timely and untimely allegations are not "closely related." *Wge Fed. Credit Union*, 346 NLRB at 983. The allegations in complaint paragraphs 7, 8(a)-(d), 10, and 13 were barred by statute.

III. The Board erred by concluding Charter otherwise violated the Act.

As detailed below, the General Counsel failed to meet its burden as to any of the non-discharge claims alleged against Charter (specifically, the allegations in paragraphs 7, 8(a)-(d), 9(a), 10, 11(a), 11(c), and 13 of the Complaint), most of which were untimely, and none of which was supported by substantial evidence. The Board therefore erred in concluding Charter "interfered with, restrained, or coerced" employees in the exercise of their Section 7 rights.

A. Charter did not engage in coercive surveillance on July 15, 2014 (paragraph 7).

The ALJ correctly held that Charter had not engaged in coercive surveillance when, on July 15, 2014, three Charter supervisors observed union activity in the

open parking lot adjacent to Charter's facility. (11/10/16 ALJ Decision 4, 23, PgID 2244, 2263; 8/15/16 Hrg. Tr. 1619-1620, PgID 1634-1635.) Of the three supervisors—Felker, Erskin, and Jurek—Erskin and Jurek credibly testified that they went outside solely to make sure that the union organizers did not trespass on Charter's property or block traffic. (11/10/16 ALJ Decision & Order 23, 4, PgID 2263, 2244.) When they satisfied themselves that these things were not occurring, they both went back inside Charter's building. (*Id*.) None of the three supervisors wrote down the names of the employees who may have supported the union. (*Id*.)

The Board erred in reversing the ALJ and concluding that this rose to the level of unlawful surveillance. The Board has often held that management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary. *Metal Industries, Inc*., 251 NLRB 1523 (1980) (citing *Chemtronics, Inc*., 236 NLRB 178 (1978)); *G. C. Murphy Company*, 216 NLRB 785, n.2 (1975); *Larand Leisurelies, Inc*., 213 NLRB 197, 205 (1974); *Tarrant Manufacturing Company*, 196 NLRB 794, 799 (1972).

There is not substantial evidence the Charter supervisors did anything "out of the ordinary." They walked outside, observed the conduct, and—after determining that the activity was not creating a safety hazard—returned inside the building. Teenier, who was not at the Saginaw office at the time of the handbilling, claimed

Culver instructed him to pay attention to who was taking the flyers and to take notes of who appeared interested, an instruction he relayed to Felker. (4/28/16 Hrg. Tr. 372-378, PgID 381-387.) The ALJ disregarded this testimony as not credible. (11/10/16 ALJ Decision 23, PgID 2263.) Felker—the General Counsel's own witness—contradicted this testimony, confusingly claiming that Erskin (not Teenier) had instructed him to note employees' names. (6/1/16 Hrg. Tr. 856, PgID 868.) Erskin, of course, denied this. (8/15/16 Hrg. Tr. 1616-1617, PgID 1631-1632.) Regardless, no names were noted. (6/1/16 Hrg. Tr. 909, PgID 921.)

The Board errantly reversed the ALJ's credibility finding and concluded that even Teenier's version of events amounted to "coercive surveillance." Teenier and Felker were unable to keep their stories straight and, as a result, are not credible in light of the consistent version told by Charter witnesses. (11/10/16 ALJ Decision 23, PgID 2263.). The only reasonable conclusion—which the ALJ adopted—is that the three supervisors observed public activity and made no notes. (8/15/16 Hrg. Tr. 1615-1616, PgID 1630-1631.) The jumble of conflicting stories is not substantial evidence of coercive surveillance. *Union Carbide Corp.*, 714 F.2d at 662 (it is "neither logical nor reasonable to rely on…'weak and suspect' testimony as substantial evidence."); *Jolliff*, 513 F.3d at 615 ("The ALJ…was the only fact-finder with the benefit of direct observation. Thus, his determination of the matter is persuasive.").

B. Charter did not give the impression of surveillance, solicit grievances, threaten closer supervision, or coercively interrogate employees on July 16, 2014 (paragraphs 8(a)-(d)).

The Board erred in concluding one alleged July 16, 2014 conversation between Teenier and French violated the Act in four different ways. According to French, Teenier asked him if French "had any idea of what went on at the office or had any—knew of anyone that did anything with union stuff." (4/26/16 Hrg. Tr. 51-52, PgID 58-59.) French told Teenier "no" and Teenier "acted nonchalant about it, like oh yeah, these things usually blow over." (*Id*) That was the extent of it. Teenier corroborated this, testifying that he met with French of his own accord, mentioned the handbilling ***but did not ask French about French's union views or whether he was supporting the union.*** (4/29/16 Hrg. Tr. 509, PgID 519.) French testified that, in the "fairly short" conversation, Teenier ***did not***:

- ask French about his union activity;
- tell French that there were rumors going around that French was the union instigator;
- tell French that he was being looked at closely by managers;
- tell French that he (Teenier) had a different stance on unions, or
- tell French that he could meet with Teenier directly or give him a call if he had any concerns.

(4/26/16 Hrg. Tr. 52, PgID 59.)

Beyond that, the General Counsel's two witnesses told different stories. Teenier claimed he initiated the conversation; French, however, claimed Felker did. (*Id.* at 51, PgID 58; 4/29/2016 Hrg. Tr. 506, PgID 516.) French testified that ***after*** his termination Teenier allegedly told him French had been the "focus of a lot of conference calls and face-to-face meetings about union activity"—a fact Teenier had omitted from sworn affidavits to the NLRB (4/26/16 Hrg. Tr. 83, PgID 90).

The contradictory testimony of the General Counsel's two witnesses who bear significant grudges against Charter was not substantial evidence that this indisputably nonchalant conversation violated the Act.

1. There was no impression of surveillance.

The test for determining whether a statement constitutes creating the impression of surveillance is whether the employees could reasonably assume from the employer's statements or conduct that their activities had been placed under surveillance. *See, e.g.*, *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op. at 3 (2014); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004); *Flexsteel Industries*, 311 NLRB 257 (1993). As French testified, Teenier allegedly only asked French if he knew anything about the union activity. He did not say or do anything that would lead French to reasonably believe that French had been placed under surveillance. The Act "does not prevent an employer from acknowledging an employee's union activity, without more." *N.L.R.B. v. Rich's of Plymouth, Inc.*,

578 F.2d 880, 885 (1st Cir. 1978) (*citing N.L.R.B. v. Mueller Brass Co.*, 509 F.2d 704, 709 (5th Cir. 1975)). The "more" that is required to constitute creating an impression of surveillance has been, for example, continuous monitoring of employee telephone conversations, threatening confrontations, or an intimidating remark. *N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110, 114 (1st Cir. 1978). French's own testimony reveals that nothing about the conversation interfered with his Section 7 rights. (4/26/16 Hrg. Tr. 51-52, PgID 58-59.) (Teenier "acted nonchalant about [the union activity], like oh yeah, these things usually blow over.").

The Board concluded French had an impression of surveillance because Teenier had made clear Charter knew about the union activity, "but did not say how [Charter] learned this information." (3/27/18 NLRB Decision & Order 5, PgID 2383.) While there is a line of authority finding an impression of surveillance where the employer conveys to the employee it is aware of the employee's union involvement—leaving the employee to wonder where the information came from—this line of authority does not apply here. French was well aware that the Charter knew about union activity from the handbilling that had taken place the day before in the Charter parking lot. *See Flexsteel Indus.*, 311 N.L.R.B. 257, 259 (1993) ("An employer does not create an impression of surveillance by merely stating that it is aware of a rumor pertaining to the union

activities of its employees, so long as there is no evidence—and here there is none—indicating that the Employer could only have learned of the rumor through surveillance."); *Pilgrim Foods, Inc.*, 591 F.2d at 114 ("The Act does not prevent an employer from acknowledging an employee's union activity, without more….").

2. Charter did not solicit grievances from French.

There is not substantial evidence Teenier solicited grievances from French in violation of Section 8(a)(1). Teenier allegedly told French that if French had any problems with him, to let him know. (3/27/18 NLRB Decision & Order 5, PgID 2387.) Again, there was ***nothing*** about a union, nor was there anything in this alleged solicitation that would imply to French a union was unnecessary. The Board focuses solely on the fact that Charter's written policy directs employees to bring issues to their immediate supervisor. (*Id.*) This is hypertechnical parsing of the policy disconnected from the real world. Teenier and French knew each other well, worked together, and got along; nothing about the interaction would reasonably give French the impression a union was unnecessary to address his concerns. The context of the interaction fell far short of the circumstances that normally imply improper solicitation; for example, pairing the solicitation with a threat about unions, or where a higher-up unknown to the employee meets with them for the first time during a union campaign to offer help. *See, e.g., Sweet*

Street Desserts, 319 NLRB 307, 307 (1995) (finding employer solicited grievances during conversation with employee that included a threat a unionizing); *Albertson's, LLC*, 359 NLRB 1341 (2013) (finding employer solicited grievances where director of labor relations—previously unknown to an employee—met directly with the employee during union organizing to ask if she had any concerns about her work).

3. Charter did not threaten French with closer supervision.

The Board erred by finding Teenier told French he was "being looked at closely by members of upper management." (3/27/18 NLRB Decision & Order 5, PgID 2387.) ***French denied Teenier ever said this***. (4/26/16 Hrg. Tr. 51-52, PgID 58-59) (testifying Teenier only asked him whether he "knew of anyone that did anything with union stuff," and dropped it after French said "no.") French also testified he ***never felt threatened by Teenier***. (4/27/16 Hrg. Tr. 109, PgID 117.) Because the target of the threat testified it never happened and never felt threatened, there cannot be substantial evidence a threat occurred.

4. Charter did not coercively interrogate French.

Nothing about the alleged words used by Teenier or the context of the conversation suggest an element of coercion or interference. Interrogation of employees is not illegal per se. *Rossmore House*, 269 NLRB 1176, 1177 (1984), *aff'd* 760 F.2d 1006 (9th Cir. 2985) ("Section 8(a)(1) of the Act prohibits

employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights.") The Act only prohibits acts of "true 'interrogation' which tend to interfere with the employees' right to organize." *Id.* The Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. *Norton Audubon Hospital*, 338 NLRB 320, 320-321 (2002).

The only union-related question Teenier supposedly asked was whether French knew about the handbilling. (4/28/16 Hrg. Tr. 381-382, PgID 390-391.) French testified he did not feel threatened. (4/26/16 Hrg. Tr. 15-25, PgID 22-32.). Indeed, the conversation with Teenier was such a non-event for French, he never told the Board about it. (4/27/16 Hrg. Tr. 193-194, PgID 201-202.) Add to that Teenier's and French's good relationship, French's testimony about Teenier's nonchalance, and the totality of the circumstances, and there is not substantial evidence Charter engaged in coercive behavior towards French on July 16, 2014.

C. Culver did not "subject French to closer scrutiny" by boing on a ride-out with him on July 17, 2014.

The Board erred by holding Charter had subjected French to closer scrutiny and engaged in surveillance of French's protected activities during Culver's July 2014 ride-out. As a threshold matter, there is no evidence that French engaged in

any protected activities that day. Further: (1) it is undisputed Culver regularly conducted ride-outs to get to know employees, and the ride-outs did not involve evaluation of their work (8/16/16 Hrg. Tr. 1660-1661, PgID 1676-1677); (2) Culver chose to do a ride-out with French at that time because Felker and Teenier told Culver that French had some questions about Charter (*id.* at 1662, PgID 1678); (3) to the extent the topic of union activity arose, French admits he (not Culver) initiated the subject and Culver immediately switched the conversation back to other matters (4/26/16 Hrg. Tr. 54, PgID 61); and (4) there is no evidence Culver scrutinized French's work during the ride-out—they were merely discussing French's questions about how the TQA evaluations were conducted. (8/16/16 Hrg. Tr. 1663-1665, PgID 1679-1681.) There is not substantial evidence the ride-out subjected French to closer scrutiny because of his union connection, particularly considering that the ride-out did not result in any disciplinary or performance-management actions, or anything else that reasonably could be construed as "scrutiny."

D. Charter did not reassign work locations of French, Schoof, and DeBeau to isolate them.

In finding the General Counsel proved this charge, the ALJ (and Board) credited what they wrongly deemed "uncontradicted testimony" of Teenier that Culver "told him" to isolate employees by assigning them to rural areas. (11/10/16

ALJ Decision 25, PgID 2265.) Yet Culver specifically denied this ever happened. (8/16/16 Hrg. Tr. 1654, PgID 1670.) The Board overlooked or ignored the existence of this testimony, nevermind its substance.

The conclusion that Charter was motivated to interfere with protected conduct is flawed for additional reasons. First, there is no evidence that assigning employees to audit rural areas "isolates" them. The opposite is true—Charter employees continue working with each other even after assignment to rural areas. Indeed, DeBeau and Schoof both testified that they rode and worked together during their rural assignment. (6/2/16 Hrg. Tr. 1077-1078, PgID 1090-1091.)

Second, because Charter provides service in both rural and urban areas, someone had to audit the rural areas. The urban system of Saginaw had already been completely audited at the time the employees were reassigned to the rural areas. (4/29/16 Hrg. Tr. 512, PgID 522.) French and DeBeau both admitted they had been assigned to audit rural areas before. (4/27/16 Hrg. Tr. 122, PgID 130; 6/2/16 Hrg. Tr. 1024, 1073-1074, PgID 1037, 1086-1087.) Nothing about the reassignment was unusual or extraordinary.

Third, Teenier himself admitted that the union activity had died down by the time he assigned the field auditors to conduct audits in the rural areas. (4/29/16 Hrg. Tr. 500-501, PgID 510-511.) His testimony that he was told to separate the employees after the union activity had subsided makes no sense.

Fourth, as shown above, Section I.B.1, Charter had no information that DeBeau and Schoof were engaged in union activity. Thus, there would be no unlawful reason to assign them to rural areas.

Finally, Teenier's testimony that he assigned the employees to rural areas to isolate them also contradicts his testimony that he was instructed to more closely monitor employees to determine whether they supported the union. (4/28/16 Hrg. Tr. 447-448, PgID 456-457.) Teenier admitted employees who were assigned to work in rural areas worked under less supervision than when they worked in the urban areas. (4/29/16 Hrg. Tr. 497, PgID 507.) If, as Teenier claimed, he was supposed to be subjecting the field auditors to closer scrutiny, he did the opposite by assigning them to remote areas.

Even if there was evidence Charter assigned the employees to rural areas because of their union activity—it did not—Charter has demonstrated that it would have assigned the employees to audit the rural areas regardless of their protected activity. Again, no one disputes Charter had to audit all houses in Michigan on an annual basis. Similarly, there is no dispute that Charter had already completed its audit of the Saginaw system—a sprawling urban system—before assigning the employees to the rural areas. The employees were going to be assigned to audit rural areas regardless of their alleged protected activity.

E. Lothian did not engage in surveillance of or threaten French with termination because of his union activity.

The Board erred by concluding Lothian gave French the impression of surveillance by conveying an implied, unspecific threat to French during the September 30, 2014 safety check. French testified about the safety check as follows:

- During the safety check, Lothian told French that he had been outed as the union mastermind. (4/26/16 Hrg. Tr. 67, PgID 74.)
- Lothian told French that Felker had discovered Schoof, DeBeau, and Teenier laying sod on company time. (*Id.* at 68, PgID 75.)
- Lothian told French that he needed to get on his side (Lothian's) because people were going to get fired. (*Id.* at 67-68, PgID 74-75.)
- French understood that when Lothian said people were going to get fired, he was referring to the non-work activities that people were doing on company time. (4/27/16 Hrg. Tr. 222-223, PgID 230-231.)

Taken as a whole, the allegation that Lothian threatened French for his prior union involvement during the safety check is not credible. The focus of the conversation, ***according to French***, was the discovery of the other employees laying sod on company time. This event had nothing to do with union organizing, and there is no reason why Lothian would mention it in this context. French specifically acknowledged that Lothian's comment about people getting fired was in reference to the alleged sod laying and had nothing to do with unionization. (*Id.*) He testified that he understood Lothian meant choosing sides in the

investigation—i.e., choosing between the rogue faction of Teenier/Felker/Schoof/DeBeau, or choosing to tell the truth about what they had been up to.[5] (4/26/18 Hrg. Tr. 80-81, PgID 87-88; 4/27/18 Hrg. Tr. 132, 220-226, PgID 140, 228-234.)

French was the only person who testified about this conversation. Yet, when determining whether French felt threatened, the Board rejected French's own understanding of the conversation and found its own. This leaves no evidence to support the Board's finding.

CONCLUSION AND REQUESTED RELIEF

Charter respectfully requests that the Court reverse the March 27, 2018 Decision and Order and hold that Charter did not violate the Act as set forth therein.

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[5] French obviously chose the side of Teenier and his co-conspirators.

Dated: November 8, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 12,932 words of Times New Roman 14-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2010.

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CERTIFICATE OF SERVICE

This certifies that Charter Communication, LLC's Opening Brief was served on November 8, 2018, by electronic mail using the Sixth Circuit's Electronic Case Filing system on: Linda Dreeben, Kira D. Vol, and Eric Weitz.

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DESIGNATION OF RECORD

All record designations are to the Agency Record filed on August 20, 2018 as R.12 on the Court of Appeals' docket.

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